No. 12229

In the United States Court of Appeals for the Ninth Circuit

KAM KOON WAN, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER PERSONS AND EMPLOYEES OF DEFENDANT WHO ARE SIMILARLY SITUATED, APPELLANTS

v.

E. E. BLACK, LTD., A HAWAIIAN CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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CITATIONS

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and for work performed on some projects prior to December 7, 1941 (R. 89). The district court awarded recovery for certain other work performed prior to December 7, 1941 (R. 90) but denied relief for claims during the period between December 7, 1941 and November 10, 1943, when martial law had been declared in the Territory of Hawaii (R. 35, 87, 89). Relief for this latter period was held barred under Section 9 of the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C. Sec. 269) on the ground that appellee had "no freedom of choice" other than to comply with the general orders of the Military Governor establishing the labor policy in the Territory (R. 45). Compliance with these orders was held to make "impossible" compliance with the Fair Labor Standards Act (R. 48).

The denial of recovery for work performed on many of the construction projects prior to December 7, 1941 was based on a "Ruling upon Coverage Pursuant to Stipulation" without a full trial (R. 69, 76). The "Ruling upon Coverage Pursuant to Stipulation" held that the work performed under contract between appellee and the Federal Government (excepting the post office at Hilo, Hawaii) did not constitute engagement in commerce or the production of goods for commerce within the meaning of the Act because it was "work for the Government upon military reservations," and (with the exception of the addition to the Administration Building for the Fourteenth Naval District and the battery charging distribution system) was "new construction" (R. 79). Some of the other projects listed in the stipulation and not performed under contract with the Federal Government were held not to be within the coverage of the Act because they constituted "new" construction (R. 81, 85).

This appeal relates to the denial of recovery for work performed prior to December 7, 1941, which the Court held did not fall within the coverage provisions of the Act, as well as for work performed between December 7, 1941 and November 10, 1943 which the court held barred by the Portal Act (R. 132).

The pertinent statutory provisions, which are reprinted as Appendix A to this brief, are Sections 3 (b), 3 (c), 3 (d), 3 (j),

and 7 (a) (3) of the Fair Labor Standards Act and Section 9 of the Portal Act.

The district court had jurisdiction under Section 16 (b) of the Act and also under Title 28, United States Code, Section 1331. This Court has jurisdiction of this appeal under Title 28, United States Code, Sections 1291 and 1294 (1).

SUMMARY OF ARGUMENT

1. The court below erred in holding that the Fair Labor Standards Act is inapplicable to work performed on a "military reservation" (R. 79). That the Act attaches no significance to the fact that the site of the work may be a "military reservation" is evident from the statutory definition of "commerce" in Section 3 (b) of the Act, and from the decisions of the Supreme Court (*Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377) and of this Court (*Ritch* v. *Puget Sound,* 154 F. (2d) 334; *Joshua Hendy Corporation* v. *Mills,* 169 F. (2d) 898), holding the Act applicable to work performed on Army or Navy sites. Moreover, nothing in military usage justifies the distinction between work performed on military reservations and other Government lands.

2. The court also erred in holding, on the basis of inadequate evidence, that many of the projects worked on by appellants for the Territorial Government and private industry constituted "new" construction and were, therefore, not within the scope of the Act (R. 80–86). There is no basis in the record for this ruling. The facts, if developed, might well show that some of appellants engaged on such projects have been engaged in interstate commerce or production of goods for commerce—such as the ordering, receipt and unloading of goods received from outside the State or handling of materials destined for interstate shipment (*Walling* v. *Jacksonville Paper Co.,* 128 F. (2d) 395 (C. A. 5), affirmed 317 U. S. 564) or work in connection with the improvement, maintenance and extension of existing instrumentalities of commerce or industrial facilities (*Pederson* v. *J. F. Fitzgerald Const. Co.,* 318 U. S. 740; 324 U. S. 720; *Ritch* v. *Puget Sound,* 156 F. (2d) 334 (C. A. 9); *Walling* v. *McCrady Const. Co.,* 156 F. (2d) 932 (C. A. 3), certiorari denied 329 U. S. 785). "The fact that all of * * *

[appellee's] business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work." *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571. In view of the "far flung import" of the issues and the limited record presented, the court should not have reached a decision "on an indefinite factual foundation". *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256, 257.

3. Finally, the district court erred in holding that Section 9 of the Portal Act barred appellants' wage claims for approximately two years—from December 7, 1941 to November 10, 1943. Contrary to the court's assumption, compliance during that period was not rendered impossible by the orders of the Military Governor in Hawaii, and any failure to pay statutory overtime was not "in good faith in conformity with and in reliance on" such orders. Since the orders were applicable only to defense work for the Army and Navy and not to other Federal, territorial or private construction projects, the wage provisions of the orders could have no effect whatsoever on approximately 20% of the projects involved. With respect to the other projects, the orders were either silent as to weekly overtime and therefore presented no conflict with the statutory overtime requirements (Cf. *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. (2d) 945 (C. A. 6)), or specifically retained the statutory requirements by providing that nothing in the orders conflicted with or superseded the Act.

ARGUMENT

I

Persons employed on a military reservation by a private company to perform the work required in its contract with the Government are not thereby excluded from the benefits of the Act

The district court held with respect to certain of the construction projects that appellants were not engaged in interstate commerce or in the production of goods for such commerce because they performed their "work for the Government upon military reservations" (R. 79). The court's reasons for this ruling are not stated. It is clear that the court considered

appellants to be employees of appellee (a private contractor) and did not regard them as employees of the Government under Section 3 (d). This is evident from the court's ruling that alteration work performed on the Federal Building Post Office at Hilo, Hawaii, under contract with the Treasury Department may be within the coverage of the Act (R. 78, 80). In this, the court was plainly correct since the only Government work excepted by Section 3 (d) is work by *Government employees.* The only question, therefore, presented by the court's ruling is whether work is necessarily withdrawn from the scope of the Act, as not constituting commerce or the production of goods for commerce, solely by reason of the fact that the work is performed on a "military reservation." The Administrator contends that the court's decision is contrary to the clear statutory language, the decisions of the United States Supreme Court and of this Court.

The district court's interpretation introduces an entirely irrelevant consideration into the determination of whether an employee is engaged in covered work. "Commerce" is defined in the Fair Labor Standards Act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Section 3 (b). "State" is defined to mean "any State of the United States or the District of Columbia or any Territory or possession of the United States." Section 3 (c). Whether appellants are engaged in "commerce" or in the production of goods for "commerce" would, therefore, depend on the relationship of their activities to the movement of goods to and from the Territory of Hawaii, and not on the nature of control over the precise place on the islands where the work is performed.[1]

[1] If the court's citation of *Kennedy* v. *Silas Mason Co.*, 164 F. (2d) 1016 (judgment vacated and remanded 334 U. S. 249) is construed as adopting the other grounds there relied upon by the Fifth Circuit in holding the Act inapplicable to defense projects constructed by private contractors, this Court's attention is directed to the Solicitor General's brief filed in the Supreme Court in the *Silas Mason* case. That brief was filed by the Administrator in this Court as part of his brief in *Joshua Hendy Corporation* v. *Mills*, No. 11794, June 1948 (169 F. (2d) 898). Questions similar to those discussed in the *Silas Mason* brief will be presented to the Supreme Court next Term in *Aaron* v. *Ford, Bacon & Davis*, 174 F. (2d) 730 (C. A. 8), certiorari granted June 27, 1949.

There is nothing in the statute to indicate that land reserved for military use is outside the purview of the statute. On the contrary, the Supreme Court recently held that the Act extends to employees at the military base in Bermuda, leased and occupied by the United States. *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377. Whether land is leased, owned or otherwise reserved for Government use is uniformly recognized by the Government defense establishments as not placing it in a special category. The term "military reservation" is merely "a phrase used by the War Department to describe real estate, devoted to War Department uses." *Ordnance Procurement Instructions* Jurisdiction and Military Reservations (57,200.1), Commerce Clearing House War Law Service (2d Ed.), Volume II (Government Contracts), par. 25,869. The War Department has stated that the phrase "has no particular legal significance," *ibid.* By giving the phrase special legal significance, the district court has drawn an artificial distinction based on the work site which finds no support either in Government usage or in law. Indeed, the usual cost-plus contract is ordinarily performed on territory controlled or owned by the Government. See, for example, Army-Navy statement that the Nation's armament program was carried out by commercial contractors or units "all" of which "are owned outright by the United States, and all but a very few * * * located upon military reservations."[2] Statement of Labor Policy Governing Government-Owned Privately Operated Plants, *War Department Labor Operations Manual* (of May 15, 1943).

[2] The district court apparently assumed that all of the work performed on Government contracts, with one exception, was on military "reservations." The record does not clearly indicate the locations where all the work was performed. It seems evident, however, that all of the Territory of Hawaii was not a military reservation. See, for example, Executive Order No. 8388, April 5, 1940, 5 F. R. 1361, providing for adjustment of the boundaries of the Puolo Point Military Reservation and Port Allen airport; Executive Order No. 8527 of August 27, 1940, 5 F. R. 3403, transferring a part of the Sand Island Military Reservation, Hawaii, to the Treasury Department; Act of October 16, 1941 (55 Stat. 741) authorizing the Secretary of War to convey the remaining portion of the Makalapa Military Reservation, Hawaii, to the Honolulu Plantation Company; Executive Order No. 8870 of August 25, 1941, 6 F. R. 4397, restoring to the Territory a part of the Waimanalo Military Reservation.

No reason appears for granting immunity from applicable Federal statutes to activities carried on on military reservations which is not granted to activities performed on non-military Government reservations. That work on a Government reservation is not ordinarily excepted from such laws was made clear by the Supreme Court in *Buckstaff Co.* v. *McKinley,* 308 U. S. 358. The Court in the *Buckstaff* case held the Social Security Act applicable to employees of an Arkansas Corporation which operated a bath house on the United States Government Reservation, Hot Springs National Park, and rejected the argument that the contractor was exempt as "an instrumentality of the United States" because of its location on the reservation. In holding a private business organized for profit was not converted into an instrumentality of the United States by the fortuity of its location, the Court stated (308 U. S. at 363):

> * * * The control reserved by the Government for protection of a government program and the public interest is not incompatible with the retention of the status of a private enterprise. * * * That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality.

This Court in several decisions under the Fair Labor Standards Act has recognized that workers are not excluded from the scope of the Act because their work is performed on land reserved for the use of the defense establishment. Thus, in *Ritch* v. *Puget Sound,* 156 F. (2d) 334 (C. A. 9), construction employees dredging channels in the harbor of the Bremerton Navy Yard were held to be engaged in commerce within the coverage of the Act. Again in *Joshua Hendy Corporation* v. *Mills,* 169 F. (2d) 898 (C. A. 9), this Court held that construction work at the Wilmington, California, shipyard owned by the Maritime Commission constituted the production of goods for commerce. In the *Ritch* and *Hendy* cases Government ownership of the ships was not held to alter the coverage of the Act where the employees' activities met the statutory definition of commerce. Thus, it is clear that the performance of a contract with the

United States on a Government or military reservation provides no preferred status to an employer with respect to the coverage of the Fair Labor Standards Act, a statute of general application. The court below was clearly in error, therefore, in ruling otherwise.

II

There is insufficient basis in the record to decide the issue of coverage

On the basis of a stipulation merely enumerating, but not describing in detail, the projects on which the workers were engaged, the lower court held a large part of them to be "new" construction and not within the scope of the Act (R. 81, 85). But the characterization of a construction project as "new" does not withdraw such activity from the scope of commerce. *Pederson* v. *J. F. Fitzgerald,* 318 U. S. 740, 742; *Ritch* v. *Puget Sound,* 156 F. (2d) 334 (C. A. 9); *Walling* v. *McCrady Const. Co.,* 156 F. (2d) 932 (C. A. 3), certiorari denied 329 U. S. 785; *Bennett* v. *Loftis,* 167 F. (2d) 286 (C. A. 4). Rather the question to be resolved is not whether the work is "new" but whether it is related to existing commerce or production therefor. The court's holding with respect to coverage, however, was based entirely on a stipulation without development of any facts on the record which would enable it to determine the nature of the work performed or the relation of the employees' activities to commerce. It is submitted that the issues here involved should not have been determined by summary procedures. The coverage issues presented by this case are not "clear cut and simple," but are "issues of far flung import" which the Supreme Court has admonished should be decided only upon a full presentation of the relevant facts. *Kennedy* v. *Silas Mason Co.,* 334 U. S. 249, 257.

The record in the instant case does not contain evidence on some of the most relevant matters. "The fact that all of * * * [appellee's] business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work." *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 571. Thus, despite the fact that "the applicability of § 7 (a) of the Act

* * * is determined not by the nature of the employer's business, but by the character of the employee's activities" (*Tipton* v. *Bearl Sprott Co.,* 175 F. (2d) 432, 435 (C. A. 9)), there is nothing in the record showing the nature of any employee's activities. It is well established that activities relating to the procurement or ordering of goods from outside the State are in interstate commerce. *Walling* v. *Jacksonville Paper Co.,* 128 F. (2d) 395, 398 (C. A. 5), affirmed 317 U. S. 564; *Walling* v. *Goldblatt Bros.,* 128 F. (2d) 778, 784 (C. A. 7), certiorari denied 318 U. S. 757; *Walling* v. *Mutual Wholesale Food & Supply Co.,* 141 F. (2d) 331, 339–341 (C. A. 8); *Walling* v. *West Kentucky Coal Co.,* 153 F. (2d) 582 (C. A. 6); *A. H. Phillips* v. *Walling,* 144 F. (2d) 102, 104 (C. A. 1); *Walling* v. *Herlihy,* 161 F. (2d) 568 (C. A. 4). Similarly, the unloading of interstate shipments has been held to constitute interstate commerce under the Fair Labor Standards Act. *Walling* v. *Jacksonville Paper Co., supra; Walling* v. *Consumers Co.,* 149 F. (2d) 626, 629 (C. A. 7); *Walling* v. *A. H. Phillips, supra; West Kentucky Coal Co.* v. *Walling, supra; Walling* v. *Herlihy, supra; Walling* v. *Mutual Wholesale Food & Supply Co., supra.* And employees who keep the books and records and write the correspondence relating to the buying, receiving and shipping of goods across State lines are engaged in commerce within the meaning of the Act. "Those who work either at selling or delivering across State lines, or at buying and receiving across state lines are employed in commerce, *whether they write the letters, keep the books or load and unload or drive the trucks*" (Italics supplied). *Walling* v. *Jacksonville Paper Co., supra; Walling* v. *Mutual Wholesale Food & Supply Co., supra; West Kentucky Coal Co.* v. *Walling, supra.* Although almost certainly a construction corporation, such as appellee, engaged in the general construction business under contracts with private individuals, the City and County of Honolulu, Territory of Hawaii and the United States (R. 19) would engage workers performing some of these activities relating to the procurement and receipt of extrastate goods, the court did not inquire into the duties of individual employees but denied recovery, in general sweeping terms, to workers on "new construction."

The variety of work performed by appellee's employees on contracts prior to December 7, 1941 is illustrated by the brief enumeration in the record of some 64 contracts (R. 69–76). Some of the projects for which recovery was denied include the construction of telephone, electric, radio and waterway facilities. Such projects performed under contract with the Federal Government were described as a battery charging distribution system at the submarine base at Pearl Harbor (R. 69, 77, 79), an airplane service landing mat at Ewa (*ibid.*), a mooring mast area (R. 69), and concrete bombproof shelters for Army radio facilities on Oahu (R. 70, 78). In addition, a wharf and concrete shed was built at Port Allen, Kauai for the Territorial Government (R. 73, 81), while a wharf and shed and wharf and pier were also constructed for a private industry (R. 73, 83, 84, 85). Construction of new substations at Hickam Field was undertaken for the Mutual Telephone Company (R. 83), the digging and back filling of trenches for underground conduits for the Hawaiian Electric Company, Limited (R. 74, 83), and the installation of a waterline for the Oahu Railway and Land Company (*ibid.*).

The decisions of the Supreme Court and of other courts have uniformly held that employees engaged in the improvement, maintenance and extension of such existing instrumentalities of commerce as are mentioned above are engaged in commerce within the meaning of the Act, even though the particular project, viewed in isolation, might be characterized as "new construction." *Pederson* v. *J. F. Fitzgerald Const. Co.*, 318 U. S. 740, 324 U. S. 726; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. (2d) 334 (C. A. 9); *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. (2d) 945 (C. A. 6); *Walling* v. *McCrady Const. Co.*, 156 F. (2d) 932 (C. A. 3), certiorari denied 329 U. S. 785; *Laudadio* v. *White Const. Co.*, 163 F. (2d) 383 (C. A. 2); *Bennett* v. *Loftis*, 167 F. (2d) 286 (C. A. 4).

Moreover, it appears that some employees may be engaged in the production of goods for commerce within the meaning of Section 3 (j) of the Act. To the extent that erection of such industrial facilities, as the ordnance machine shop at Fort Shafter, Honolulu (R. 70, 78), may have been a part of existing

facilities used to produce or repair parts of ships, planes, or submarines which were sent outside the Territory, such work would constitute the production of goods for commerce. *Walling* v. *Roland Electrical Co.*, 326 U. S. 657; *Joshua Hendy Corporation* v. *Mills*, 169 F. (2d) 898 (C. A. 9); *Griffin Cartage Co.* v. *Walling*, 153 F. (2d) 587 (C. A. 6); *Walling* v. *Morris*, 155 F. (2d) 832 (C. A. 6), reversed on other grounds 332 U. S. 422. But the court held this work not covered by the Act despite the fact that the nature of the individual employee's job classification, i. e., whether mechanics, laborers, etc., as well as the specific activity performed, is undeveloped in the record. In the ordinary case, however, these workers would be considered a part of "an integrated effort for the production of goods" and thus necessary to production within the statutory definition. *Armour & Co.* v. *Wantock*, 323 U. S. 126, 130. Nor is it shown by the record whether appellee's employees included a clerical and administrative staff to assist in the production activity. For "equally a part of the [productive] pattern are the administration, management, and control of the various physical processes together with the accompanying accounting and clerical activities." *Borden* v. *Borella*, 325 U. S. 679, 683.

Finally, a full presentation of the facts may show that the construction of a warehouse storage building and roads, an underground storage tank, container plant and warehouse all built for the Hawaiian Pineapple Company, Ltd. (R. 74, 83, 84) may be included within the statutory definition of production. The Act has been held to extend to the construction of a new structure and roadways used as an integral part of an existing plant producing goods for commerce. *Walling v. McCrady Const. Co.*, 156 F. (2d) 932 (C. A. 3), certiorari denied 329 U. S. 785. In the *McCrady* case, the repair of drainage ditches, plant roadways and walks were held integral parts of the existing plant. Moreover, the court in the *McCrady* case brushed aside artificial distinctions between "new" construction and reconstruction in holding subject to the Act work performed in building a new tinning mill and other new industrial facilities (see 60 F. Supp. 243, 251–252) as part of an existing establishment producing goods for commerce. The court quoted with approval the trial court's holding that "These new

units were all integral parts of existing plants and were constructed to enlarge or replace outmoded buildings and machinery and thus to continue the operation of the plant as a whole". (156 F. (2d) at 937.) If the structures in the instant case were in fact "integral parts" of processing plants, plants already in operation—as appears to be the case with the Hawaiian Pineapple Company—appellants' work would appear to be necessary to production "as part of an integrated effort" for the production of goods and therefore within the coverage of the Act. *Armour & Co.* v. *Wantock,* 323 U. S. 126, 130. If there is a complete trial in this case, "appellants will, of course, have the burden of proving that the process or occupation in which they were employed was, in fact, necessary to the production of goods for commerce. They may sustain this burden. They may fail to sustain it, but we cannot assume they will fail." *Tipton* v. *Bearl Sprott Co.,* 175 F. (2d) 432, 435 (C. A. 9).

In view of the inadequacy of the present record, it would seem impossible to determine whether appellants' work should be regarded as properly within the scope of the Act. When such a limited record was presented to the Supreme Court in *Kennedy* v. *Silas Mason Co.,* 334 U. S. 249, involving questions of coverage with respect to employees of a cost-plus-fixed-fee contractor with the Government, the Court vacated a summary judgment and remanded the case to the district court. The Supreme Court there pointed out that "No conclusion in such a case should prudently be rested on an indefinite factual foundation." 334 U. S. at 256. Accordingly, we respectfully suggest that the case be remanded to the district court to determine all relevant facts regarding the construction work in which appellants were engaged.

III

The military orders governing labor conditions in the Territory of Hawaii provide no defense under section 9 of the Portal-to-Portal Act

The lower court's judgment barring, under Section 9 of the Portal Act (29 U. S. C. sec. 259), appellants' wage claims for the period from December 7, 1941 to November 10, 1943 was

based on its holding that appellee had "no freedom of choice" other than to comply with military orders fixing wages during that period (R. 45) and that, therefore, compliance with the Fair Labor Standards Act was "impossible" (R. 48). Despite the added finding that defendant "must have known it was not paying and working its employees as directed by the Fair Labor Standards Act" (R. 48), the court concluded that any noncompliance was "in good faith in conformity with and in reliance on" orders of an agency of the United States.

It is the Administrator's position that nothing in the military orders issued precluded compliance with the Fair Labor Standards Act, and that therefore, any failure to pay the statutory wages was not "in good faith in conformity with and in reliance on" such orders. The applicable orders, issued by the Office of the Military Governor, governing working conditions in Hawaii, were General Orders Nos. 38, 91, 10 and 40 (R. 37–40). Their general purpose was to fix uniform wage rates on all defense projects, establish a regular 48-hour week on these projects, "freeze" employees on war projects and on certain private jobs, impose penalties on employees for leaving their jobs without bona fide releases from employers, and establish an appeal agency to hear discharge cases. (Cf. R. 62–66.) There was no indication in any of these orders that they were intended to supersede Federal laws otherwise applicable. On the contrary, these orders are consistent with the whole purpose of martial law, which is not to suspend existing laws but to see that the laws are faithfully executed. The Federal statute authorizing the declaration of martial law in Hawaii provides that "The governor shall be responsible for the faithful execution of the laws of the United States * * *." 31 Stat 153, 48 U. S. C. sec. 532.

It is important to note at the outset that the provisions of the general orders dealing with the length of the workweek and wage rates were limited to defense work under the Army and Navy Departments and did not include work performed for the territorial government or for private industry. The court, however, erroneously treated all construction work as governed by the orders and did not distinguish between the

kinds of projects undertaken.[3] It is therefore apparent that the court's denial of recovery under the Portal Act could not properly apply to commercial work, which amounted to approximately 20% of the work during the period (R. 25, 40).

The only order specifically mentioning the Fair Labor Standards Act was General Order No. 91 which provided that "Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh-Healey Public Contracts Act" (R. 62). Thus at least for the period when General Order 91 was in effect—from April 1, 1942, to March 10, 1943, the specific provisions of the military order directed that the applicable Federal laws governing wages were not superseded.

Not only did the specific proviso negate any intent to supersede the provisions of the Fair Labor Standards Act, the wage requirements of General Order No. 91 presented no conflict with the wage standards of the Act. The Order provided generally for a normal workweek of six days of eight hours each and required overtime to be paid at the rate of one and one-half times the regular rate of pay for hours worked in excess of 44 in a week or in excess of 8 in one day (R. 38, 63). The Order contained nothing prohibiting compliance with the statutory standard which requires payment for the work covered by it at one and one-half times the regular rate after 40 hours in a week. Moreover, as shown above, the Order expressly disclaimed such conflict.

General Order No. 91 not only did not conflict with the Federal Act or preclude in any way overtime payment in accordance with statutory standards, but set rates in contemplation that the federal Act was applicable. Wage Schedule No. 9, referred to in General Order No. 91 as setting the wage scales for Government contractors (R. 63), listed rates of pay for designated job classifications. This Schedule established

[3] Although General Order No. 38 (R. 59) does not contain the explicit delimiting provisions contained in the other orders, there is no question that it did not apply to private firms not engaged in war work. See fn. 4, *infra*, p. 15. Moreover, under General Order No. 38, wage rates were frozen on the Island of Oahu only and not on work performed on other islands. It does not appear that all of the work in issue was performed within this geographical limitation.

standard hourly rates for job classifications on the basis of the length of workweek (Appendix B, p. 23). Different base rates were thus set for classifications performing work on a forty-hour week, forty-four hour week, and forty-eight hour week (*ibid.*) The regulations preceding the Schedule and made a part thereof clearly stated that the "classifications listed under 40-hour week basis are those subject to Fair Labor Standards Act of 1938, which provides for payment on a 40-hour week basis instead of a 44-hour week basis" (*ibid.*, p. 22). Thus, despite the clear wording of the Order negativing any conflict with the Act, if any doubt was suggested as to the Act's applicability, the wage schedule incorporated in Order No. 91 made reference to the Federal law and established base rates with a view to its applicability. Far from giving notice of a "variance" with the Federal Act (R. 48), the military orders gave notice of the Act's requirements.

Nor did the earlier General Order 38 issued December 20, 1941, affect the continued application of the Fair Labor Standards Act (R. 59). Although it made no reference to the Federal Act, its provisions for a normal working day of eight hours and requirement that overtime be paid at one and one-half times the regular rate thereafter in no way posed a conflict with the Act, requiring overtime payment after forty hours in a workweek.[4] It can hardly be contended that the failure of this Order to mention weekly overtime presented any conflict with the Federal law. Certainly, as demonstrated (*supra,* 14), any possible question presented by General Order 38 as to the applicability of the Act was clarified by General Order 91 issued shortly thereafter and containing the explicit

[4] Although General Order 38 contained only a provision for payment of overtime after 8 hours in a day and contained no reference to the Walsh-Healey Public Contracts Act, providing for overtime payment for a workweek longer than 40 hours as well as for hours worked in excess of 8 in a day, representatives of the Military Government were advising employers that the higher labor standards of the Walsh-Healey Act and the Fair Labor Standards Act were in "full effect" and had not been suspended (see Appendix C, pp. 24–25).

See also President Roosevelt's statement reported in *Honolulu Star-Bulletin*, January 1, 1942, stating the governmental policy of continued enforcement in Hawaii of the Wage-Hour Law requiring compensation at time and one-half for hours worked over 40 in a week (Appendix D, p. 26).

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statement that the Order was not intended to supersede or conflict with the provisions of the Fair Labor Standards Act.

General Order No. 10, issued March 10, 1943, following General Order No. 91, likewise presented no difficulty in complying with the Federal statute (Appendix E, p. 27). Like General Order No. 91, it provided, inter alia, for an 8-hour day and 6-day week with overtime payable after 44 hours in a week or 8 hours in a day. Like the other orders mentioned, no restriction was placed upon complying with the Federal statute and Wage Schedule No. 9, incorporated in the Order, designated standard wage scales and made specific reference to base rates established for activities subject to the Fair Labor Standards Act (Appendix B, p. 23).[5]

Since the orders presented no conflict with the application of the Fair Labor Standards Act, the lower court's holding that appellee was required to continue its wage practices cannot stand. The military orders here, unlike the flat prohibition of overtime compensation for certain supervisory employees contained in the War Department instructions in *Lassiter* v. *Atkinson Co.* (C. A. 9, decided August 24, 1949), did not prohibit additional compensation for hours worked in excess of the statutory maximum. The lower court's ruling would in effect repeal the Act "at a time when all, or nearly all major industries are operating upon government contract." *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. (2d) 945, 949 (C. A. 6). In a similar situation reconciling the application of the Eight Hour Law (40 U. S. C. Sec. 321) with the Fair Labor Standards Act, the Court of Appeals for the Sixth Circuit stated, "Repeals by implication are not favored and a later law will not be construed to repeal one enacted prior thereto unless the two acts are so clearly repugnant that they may not easily be reconciled." *Walling* v. *Patton-Tulley Transp. Co., supra*

[5] The final order involved here, General Order No. 40, issued November 1, 1943, contained the same clause as General Order No. 91 providing that "Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938" and requiring overtime payment after 40 hours worked in a week or 8 hours in a day (R. 37; see record No. 10763, *Kahanamoku* v. *Duncan*, (1944), p. 311, filed in this Court). Appellee makes no contention that this latter order precluded compliance with the Federal statute.

at 948. Like the Eight Hour Law in the *Patton-Tulley* case providing for payment of overtime after more than 8 hours had been worked in a day, which was held completely consistent with the Fair Labor Standards Act, the original General Order 38 (R. 59) with the same provision as the Eight Hour Law may easily be reconciled with the Act and can stand in no favored position. "No difficulty will be perceived," said the Court in the *Patton-Tulley* case "in complying with both statutes,—giving overtime pay for work in excess of the weekly maximum, in the one case, and overtime pay for work in excess of the daily maximum, in the other." 134 F. (2d) at 948. Its subsequent replacement by General Orders No. 91 and No. 40, containing a clear proviso preserving the employee's right to higher wage and hour standards to which the Act might entitle him, cannot serve to deprive the employee of the benefit of the Act's standards. "No reason appears why contractors for the government are to be permitted to maintain sub-standard labor conditions while private contractors are prohibited from doing so." *Patton-Tulley* case, supra, 134 F. (2d) at 949.[6]

Appellee has failed to show that it acted "in good faith in conformity with and in reliance on" any agency ruling which would bar any wage claim under the Fair Labor Standards Act. As the court found, appellee "knew or should have known it was not complying with the Fair Labor Standards Act" (R. 47). The military orders on which appellee claims to rely did not make compliance with the Act impossible, but, rather, as

[6] The Acting Administrator's views as expressed in a telegram of December 10, 1941, to the Labor Department's Territorial Representative (R. 41) was intended to apply only to the situation where the Government is in the position of an employer in supervising, controlling and paying workers and not where the direction, supervision, and control of the work is maintained by private firms. Cf. *Creekmore* v. *Public Belt Railroad Commission*, 134 F. (2d) 576 (C. A. 5), certiorari denied 320 U. S. 742. Similarly, the letter of February 18, 1941, from the Administrator to Secretary Knox (Def. ex. 2, R. 119), referring to certain construction work not covered by the Act, was not intended to give blanket exclusion to construction workers on Government projects and was subsequently modified to clarify any misunderstanding with respect to the Act's coverage (Appendix F, p. 29). Nor was there good faith reliance on such interpretations as required by Section 9 of the Portal Act (R. 41–42, 125). Cf. *Lassiter* v. *Atkinson Co.*, (C. A. 9, decided August 24, 1949).

we have shown, required such compliance. The court, therefore, erred in holding that there was a repugnance or inconsistency between the military orders and the operation of the Federal statute.

Respectfully submitted.

WILLIAM S. TYSON,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

WILLIAM A. LOWE,
HELEN GRUNDSTEIN,
Attorneys, United States Department of Labor,
Washington, D. C.

KENNETH C. ROBERTSON,
Regional Attorney.

SEPTEMBER 1949.

APPENDIX A

Statutory Provisions Involved

Questions raised on this appeal deal with the applicability of the following sections of the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947.

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201.

Sec. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked or in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is en-

gaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. sec. 261 et seq.

SEC. 9. Reliance on past Administrative Rulings, Etc.— In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceedings, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

APPENDIX B

Wage Schedule No. 9—(Revised—May 3, 1942)

LABORERS AND MECHANICS

Rules and Regulations

1. Effective date of this revised and amplified Wage Schedule No. 9 shall be the beginning of the first pay roll period after May 3, 1942. The wage rates shown on Schedule No. 9 are to apply to all persons employed on defense projects in the Territory of Hawaii, amenable to General Order #91, whether employed locally or on the mainland. In the case of those persons employed on the mainland for work in the Territory of Hawaii, they shall be furnished with free board and lodging or, in lieu thereof, a cash payment of $45.00 per month, at the option of the employer.

2. The furnishing of free board and lodging or the cash payment to mainland workmen shall be a consideration for the necessity of maintaining a mainland home, other expenses resulting from their residence away from home, and surrendering the privileges of life in their home community.

3. As provided for in General Order #91, no person shall be employed at a rate less than, or in excess of, the rates contained in this schedule, provided that employees presently receiving rates in excess of those shown on this schedule shall not be reduced.

4. Certain persons now employed on defense projects in the Territory of Hawaii under contract from the mainland have formerly received salary or wages for loss of time due to illness or compensable injury. Such time lost through illness or compensable injury will no longer be paid, effective the beginning of the first pay roll period after May 3, 1942. Henceforth, the only payments for loss of time shall be those to which the employee is entitled under the Defense Base extension of the Longshoremen's and Harbor Workers' Compensation Act.

5. Classifications listed under 40-hour week basis are those subject to Fair Labor Standards Act of 1938, which provides for payment on a 40-hour week basis instead of 44-hour week basis.

6. Classifications shown in second column provide for payment on a 44-hour week basis.

7. Classifications shown in third column are on a 48-hour week basis and are to be used only on those projects working on a stipulated 48-hour week, prior to April 1, 1942.

8. Payment for overtime work on all job classifications included in this schedule shall be on the basis of one and one-half times the regular rate of pay for hours worked in excess of eight hours in one day, and hours in excess of the stipulated workweek.

Excerpts From Wage Schedule No. 9

Revised 3 May 1942

LABORERS—MECHANICS

Classification	*40 Hr. Wk. Base Rate*	*44 Hr. Wk. Base Rate*	*48 Hr. Wk. Base Rate*
Aggregate Plant Foreman		$1.60	$1.65
Aggregate Plant Screenman		1.10	1.15
Asphalt Plant Foreman		1.60	1.65
Asphalt Plant Fireman		1.25	1.30
Barge Maintenance Foreman	$1.05		
Bargeman	0.75		
* * *			
Shifter			1.65
Ship Foreman	1.20		
Sprinkler Fitter Foreman		1.65	1.70
Sprinkler Fitter		1.45	1.50
Sprinkler Fitter Helper		0.80	0.85
Steam Fitter Foreman		1.65	1.70
Steam Fitter		1.45	1.50
Steam Fitter Helper		0.80	0.85
Stevedore	0.75		
Structural Steel Foreman		1.95	2.00
* * *			

EQUIPMENT OPERATORS

* * *			
Carrier—Lumber	0.85	0.90	0.95
Carryall		1.40	1.45
Cement Gun		1.50	1.55
Concrete Mixer—Paving		1.25	1.30
Crane—¾ yd and over	1.55	1.60	1.65
Crane—Under ¾ yd	1.40	1.45	1.50
Crane Apprentice	0.95	1.00	1.05
Crusher		1.10	1.15
Derrick—Land		1.50	1.55
Dragline—¾ yd and Over		1.60	1.65
Dragline—Under ¾yd		1.45	1.50
Feeder (Crusher)		1.10	1.15
Finishing Machine (Concrete or Asphalt)		1.25	1.30
Grader (Motor)		1.30	1.35
Grout Gun		1.10	1.15
Grout Mixer		1.10	1.15
Group Pump		1.10	1.15
Gunite		1.50	1.55
High-lift	0.85	0.90	0.95
Hoist Steam (1 & 2 drums)		1.25	1.30

APPENDIX C

War Department
United States Engineer Office
Honolulu, T. H.

January 10, 1942.

Grace Brothers, Limited,
75 South Queen Street, Honolulu, T. H.

Gentlemen:

Mr. Howard Durham, Representative of the Labor Department of the United States in the Territory of Hawaii, has brought to my attention your request to him for information as to whether the Walsh-Healey Act applied on your contract to furnish supplies to this office.

You are advised that compliance with the Walsh-Healey Act, as required by the terms of your contract with the District Engineer, is in full effect and has not been suspended by any order issued by the Military Governor which has been brought to the attention of the District Engineer.

Very truly yours,

Theodore Wyman, Jr.,
Colonel, Corps of Engineers,
District Engineer.

cc—Mr. Durham, Labor Board.

347 Federal Building
Honolulu, T. H.

January 13, 1942.

Col. Theodore Wyman, Jr.,
District Engineer, U. S. Engineer Department,
P. O. Box 2240, Honolulu, T. H.

Dear Colonel Wyman:

Enclosed herewith is a copy of a memorandum issued by the Hawaiian Electric Co., Ltd., to its employees on January 6, explaining the delay in the payment of overtime and instructing all employees to remain in their present jobs in accordance with Section 2 of General Order No. 38.

As you know, I attended the conference on December 12 in the Construction Quartermaster's Office at Pearl Harbor at which time the basic points subsequently covered in General Orders No. 38 were discussed, and hence feel cognizant of the purpose and intent of this Order. It is my opinion, based on that discussion, that Section 4 of the General Orders defining the workday was intended to apply only to direct defense industries and was not intended to apply to private industry. The Hawaiian Electric Company, however, which is subject to the Fair Labor Standards Act (requiring time and one-half for hours in excess of 40 per week), takes the position that this Section applies to its operations and hence has suspended overtime payments entirely until this question is clarified by the proper authorities.

This office would appreciate an opinion from your office as to whether Section 4 of the present Orders regulates the overtime policy of the subject company.

Very truly yours,

Howard E. Durham,
Special Representative.

Enclosure
HED: EB

APPENDIX D

U. S. Wage-Hour Law Is Operative Here

The Federal Wage-Hour act is still operative here, says Howard E. Durham, special representative of the United States Department of Labor.

Mr. Durham, referring to a recent proposal that wages and hours should be "frozen" on defense work, pointed to a recent announcement of President Roosevelt. This announcement, a copy of which, in the form of a news dispatch, has been sent to Mr. Durham from the regional office in San Francisco, is as follows:

"President Roosevelt said today he thought the 40 hour week provisions of the Wage-Hour act still stood, and any working time over 40 hours should be compensated for at time and a half.

"He replied in the negative to a press conference question whether any change in the 40 hour provision was contemplated in view of the war situation. However, there might be some lengthening of hours for Government workers, he agreed."

Honolulu Star-Bulletin
January 1, 1942

APPENDIX E

General Orders No. 10[1]

* * *

4. Wages.

4.01. Revised Wage Schedule No. 9, dated 3 May 1942 and effective at the beginning of the first pay-roll period after 3 May 1942, hereby is designated as the standard wage scale for workers engaged in work on construction and other projects under the War Department. No person seeking work or employed on construction or other projects under the War Department or the Navy Department, shall be employed at a rate less than, or in excess of the standard rate for the job as listed in Wage Schedule No. 9, and as same may be revised from time to time, as approved by the Military Governor.

4.02. Federal agencies under the War Department or the Navy Department, shall continue their regularly established wage schedules.

5. Hours of Work and Overtime.

5.01. Normal workweek for employees on construction and other projects under the War Department or the Navy Department shall be six (6) days of eight (8) hours each. The maximum number of hours worked in any seven (7) consecutive days shall not exceed fifty-six (56), except in cases of emergency and with the approval of the Chief of Military or Naval Service concerned.

5.02. Normal workweek for employees of the United States under the War Department or Navy Department shall conform to applicable Federal regulations.

5.03. Employees on construction and other projects under the War Department or the Navy Department shall be paid overtime at the rate of one and one-half the regular rate for overtime in excess of forty-four (44) hours per week, or in excess of eight (8) hours in any one day. Double the regular

[1] General Order No. 10 is reprinted in full in record filed in this Court in *Kahanamoku* v. *Duncan*, No. 10763 (1944), Vol. I, p. 208.

rate will be paid for work performed on the seventh consecutive work day. One and one-half the regular rate will be paid for work performed on any of the following days only: New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, and Memorial Day.

5.04. Paragraph 5.03 above shall not apply to employees who are in a supervisory capacity on a monthly salary basis.

5.05. Employees of the United States under the War Department and the Navy Department shall be paid overtime in accordance with applicable Federal regulations.

5.06. For employees engaged on construction and other projects under the War Department and the Navy Department, work shall be so scheduled that all employees shall receive one (1) day off in seven (7). Sunday work per se shall not be considered overtime, and no overtime shall be paid for Sunday except when it is worked consecutively in excess of six (6) days.

5.07. The provisions of any contract between individual employees, labor unions, and employers engaged on construction and other projects under the War Department or the Navy Department, in conflict with the provisions of this General Orders hereby are suspended.

* * *

APPENDIX F

FEBRUARY 19, 1943.

Hon FRANK KNOX
Secretary of the Navy
Washington, D. C.

MY DEAR MR. SECRETARY:

Reference is made to my letter of November 13, 1942, regarding a conference with representatives of your Department, the War Department, the Defense Plant Corporation and myself to resolve any misunderstanding which might exist concerning the applicability of the Fair Labor Standards Act to employees of firms engaged in construction work for the Government.

Since the conference, and the earlier meeting at which representatives of several of the firms were present, I have made a complete canvass of the facts and have concluded that a contractor holding a cost-plus-a-fixed-fee contract from the Government is in a position no different from that of a contractor doing work for a private customer, so far as his liability under the Fair Labor Standards Act is concerned.

The position of this Division respecting applicability of the Act to employees of construction firms has been set forth in bulletins and interpretations with which the members of the industry generally are familiar. Briefly, employees engaged in the original construction of buildings are not generally within the scope of the Act even if the buildings when completed will be used to produce goods for commerce. There may be, and there usually are, some employees of such construction contractors, however, who engage in some form of interstate commerce and for that reason are subject to the Act. Hence, in the case of the new construction of buildings, the Act is applicable to employees engaged in receiving or unloading materials received from outside of the State, to watchmen who guard such materials, to office employees whose work is concerned with ordering, purchasing, or receiving such materials,

to draftsmen or office employees who prepare plans or drawings or records destined to leave the State in which they work, to timekeepers and payclerks who keep time records and make pay rolls for employees who work in connection with the shipment of materials or equipment away from the site to any point outside the State.

Where original construction is a part of the process necessary to the production of goods for commerce, for example the construction of an oil derrick preliminary to the production of oil, all employees are subject to the Act. All employees engaged in maintaining, repairing or reconstructing buildings used for the production of goods for interstate commerce or maintaining, repairing or reconstructing essential instrumentalities of commerce also are subject to the Act.

The enforcement policy of the Division with respect to such contractors will be to require compliance and payment of all wages due under the Act. The Division, however, will not seek restitution of wages due before March 1, 1943, but the employees, if they care to do so, have the right under Section 16 (b) of the Act to bring their own suits to recover double the amount of any additional wages due plus costs and reasonable attorney's fees.

Very truly yours,

L. METCALFE WALLING,
Administrator.

AD:FGG:VD
Copy/nr

MARCH 1, 1943.

The Honorable
THE SECRETARY OF THE NAVY

MY DEAR MR. SECRETARY:

Reference is made to my letter of February 19, 1943, concerning the applicability of the Fair Labor Standards Act to employees of contractors doing work for the Government on a cost-plus-a-fixed-fee basis.

I am advised that at a conference held in Washington on February 18, 1943, attended by Mr. William R. McComb, the Deputy Administrator of this Division, Mr. Irving J. Levy, the Solicitor of the Department of Labor, Lieut. Charles Pennebaker, of the Bureau of Yards and Docks of the Navy Department, and a number of representatives of the War Department, Lieut. Pennebaker called attention to a letter addressed to you on February 18, 1941, by James F. King, Acting for Philip B. Fleming, at that time Administrator of this Division.

Lieut. Pennebaker stated that the Navy Department had interpreted Mr. King's letter as a holding by this Division that no employee of a cost-plus-a-fixed-fee contractor is subject to the Fair Labor Standards Act if that contractor is engaged on construction work.

One of the purposes of my letter of February 19 was to overrule the letter from Mr. King which I consider to have been erroneous and to point out that in my opinion employees of such contractors doing work for the Government are in a position no different from that of the employees of contractors doing similar work for private customers. The position that a cost plus-a-fixed-fee contractor is not an agent of the United States is sustained by decisions of the courts, including the Supreme Court of the United States in the case of *Alabama* v. *King & Boozer,* 314 U. S. 1.

Sincerely yours,

L. METCALFE WALLING,
Administrator.

AD:FGG:VD
Copy/nr

U. S. GOVERNMENT PRINTING OFFICE: 1949